

---

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1991

---

JEFFERY ANTOINE,

Petitioner,

v.

BYERS & ANDERSON, INC. and  
SHANNA RUGGENBERG,

Respondents.

---

RESPONDENTS' OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

---

Tyna Ek  
(Counsel of Record)  
MERRICK, HOFSTEDT & LINDSEY, P.S.  
710 Ninth Avenue  
Seattle, Washington 98104  
Telephone: (206) 682-0610  
Attorneys for Respondent  
Byers & Anderson, Inc.

William P. Fite  
(Counsel of Record)  
BETTS, PATTERSON & MINES  
1215 Fourth Avenue, #800  
Seattle, Washington 98161-1090  
Telephone: (206) 292-9988  
Attorneys for Respondent  
Shanna Ruggenberg

TABLE OF CONTENTS

	<u>Page</u>
I. <u>RESPONSE TO PETITIONER'S</u> <u>STATEMENT OF THE CASE</u> . . . . .	1
II. <u>RESPONSE TO STATEMENT OF</u> <u>FACTS</u> . . . . .	4
III. <u>SUMMARY OF ARGUMENT</u> . . . . .	6
IV. <u>LEGAL ANALYSIS</u> . . . . .	8
A.    THE NINTH CIRCUIT FOLLOWED PRECEDENT IN APPLYING ABSOLUTE QUASI-JUDICIAL IMMUNITY TO COURT REPORTERS . . . . .	8
B.    THE NINTH CIRCUIT'S APPLICATION OF ABSOLUTE QUASI- JUDICIAL IMMUNITY TO COURT REPORTERS IS NOT IN CONFLICT WITH RECENT SUPREME COURT DECISIONS . . . . .	12
1. <u>The Ninth Circuit</u> <u>Decision Does Not</u> <u>Conflict With</u> <u>Westfall Or</u> <u>Forrester</u> . . . . .	12
a.    In <u>Westfall</u> , The Court Analyzed Executive, Not Judicial, Immunity . . . . .	13

b.	The Ninth Circuit's Decision Is Con- sistent With <u>Forrester</u> . . . . .	15
2.	<u>Public Policy Favors The Applica- tion Of Absolute Quasi-Judicial Immunity To Court Reporters</u> . . . . .	20
V.	<u>CONCLUSION</u> . . . . .	24
Appendix A		
Appendix B		
Appendix C		

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Antoine v. Ayers &amp; Anderson, Inc.</u> , 950 F.2d 1471 (9th Cir. 1991) . . . . .	22
<u>Dellenbach v. Letsinger</u> , 889 F.2d 755 (7th Cir. 1989), <u>cert. denied</u> , 494 U.S. 1085 (1990) . . .	10, 19, 22, 23
<u>Dieu v. Norton</u> , 411 F.2d 761 (7th Cir. 1969) . . . . .	11
<u>Ex Parte Virginia</u> (100 U.S. 399) . . . . .	17
<u>Forrester v. White</u> , 484 U.S. 219 (1988) . . . . .	7, 12, 13, 15, 16, 17, 18, 20, 22, 24
<u>Mullis v. United States Bankruptcy Court, District of Nevada</u> , 828 F.2d 1385 . . . . .	11
<u>New Alaska Development Corp. v. Guetschow</u> , 869 F.2d 1298 (9th Cir. 1989) . . . . .	21
<u>Peckham v. Scanlon</u> , 241 F.2d 761 (7th Cir. 1957) . . . . .	9, 17
<u>Saul v. Larsen</u> , 847 F.2d 573 (9th Cir. 1988) . . . . .	15
<u>Stewart v. Minnick</u> , 409 F.2d 826 (9th Cir. 1969) . . . . .	8, 9, 17

<u>Sullivan v. Kelleher</u> , 405 F.2d 486 (1st Cir. 1969) . . . . .	11
<u>Thurston v. Robison</u> , 603 F. Supp. 336 (D. Nev. 1985) . . . . .	11
<u>United States v. Antoine</u> , 906 F.2d 1379 (9th Cir. 1990) . . . . .	3, 4, 5
<u>Westfall v. Erwin</u> , 484 U.S. 292 (1988) . . . . .	12, 13, 14, 15
<u>Zimmerman v. Spears</u> , 428 F. Supp. 759 (W.D. Tex. 1977) . . . . .	11

#### Other Citations

28 U.S.C. § 1983 . . . . .	16
42 U.S.C. § 1983 . . . . .	9
Supreme Court Rule 24.2 . . . . .	1

Respondents Byers & Anderson, Inc. and Shanna Ruggenberg ask that the Court deny petitioner Jeffery Antoine's petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

#### I. RESPONSE TO PETITIONER'S STATEMENT OF THE CASE.

Pursuant to Supreme Court Rule 24.2, the respondents have limited their statement of the case to information necessary to correct inaccuracies or omissions in the statement by the petitioner.

Respondents object to petitioner's characterization of the underlying District Court and Ninth Circuit opinions as having granted "absolute immunity to a court reporter for gross negligence in failing to produce and deliver a trial transcript in direct violation of her duties under statute

and court rule, as well as in direct derogation of numerous express court orders." Petition at 2. Neither the complaint nor the orders in question reference "gross negligence." Moreover, the record considered by the courts below does not contain "numerous express court orders" violated by Shanna Ruggenberg. The record considered by the District Court included only one court order. This was a June 1988 order issued by the Ninth Circuit Court of Appeals. In that order, the Ninth Circuit ordered Shanna Ruggenberg to file the transcript in question, file a motion for extension of time, turn over her notes to her attorney, or submit an affidavit to the Ninth Circuit indicating that she is unable to locate her notes pertaining to the transcript in question. See Appendix A. Shanna Ruggenberg subsequently filed an

affidavit with the Ninth Circuit, indicating that she had filed a partial transcript and that she was unable to locate the remainder of her notes. See Appendix B. Petitioner's attempt to expand the record on reconsideration and appeal was specifically rejected by the Ninth Circuit which granted respondent Byers & Anderson, Inc.'s motion to strike. See Appendix C.

Respondents object to petitioner's assertion that Shanna Ruggenberg's behavior resulted in a four-year delay in petitioner Jeffery Antoine's appeal of his criminal conviction. Petition at 3. The Ninth Circuit found that a delay of approximately two years resulted from the unwillingness or inability of the court reporter to produce a completed transcript. United States v. Antoine, 906 F.2d 1379, 1382 (9th Cir. 1990).



Respondents object to petitioner's statement that Jeffery Antoine was denied a remedy for the delay in receiving a completed transcript in his criminal appeal because of any alleged remedy available to him in the civil system. Petition at 3. Jeffery Antoine was not denied a remedy in his criminal appeal. The Ninth Circuit Court of Appeals vacated Jeffery Antoine's conviction and remanded to the district court to consider whether Antoine could show specific prejudice resulting from his lack of a complete transcript and, in the event of a retrial, whether he could demonstrate that his defense would be impaired as a result of the delay in receiving a completed transcript. United States v. Antoine, 906 F.2d at 1384.

## II. RESPONSE TO STATEMENT OF FACTS.

Respondents object to the petitioner's statement that the Western

District of Washington at Tacoma "contracted" on an emergency basis with Byers & Anderson, Inc. to provide court reporting services. Petition at 3. The record below did not contain evidence of a contract. Respondent Byers & Anderson, Inc. specifically denies the existence of a contract, and this issue was not before the courts below.

Respondents object to petitioner's statements indicating that Shanna Ruggenberg failed to meet various court deadlines, request an extension, or communicate with counsel. Petition at 3-4. These statements are not supported by the record considered below.

Respondents object to petitioner Antoine's statement that the Ninth Circuit refused to order that Antoine be acquitted because of the availability of a civil remedy for any due process violation. See Petition at 5. The

Ninth Circuit vacated Antoine's conviction and remanded to the district court to determine whether Antoine could show specific prejudice arising from his lack of a complete transcript, and whether (under his due process claim) Antoine could demonstrate that his defense would be impaired on retrial as a result of the delay in receiving the transcript. United States v. Antoine, 906 F.2d at 1384.

### III. SUMMARY OF ARGUMENT.

The Ninth Circuit followed strong precedent within its own jurisdiction when it applied absolute quasi-judicial immunity to Shanna Ruggenberg and Byers & Anderson, Inc. The petitioner argued below that the Ninth Circuit's long-standing application of absolute quasi-judicial immunity to court reporters was somehow overruled by recent Supreme Court decisions. In interpreting these

recent Supreme Court decisions, no appellate court has held that they overrule precedent in jurisdictions which have extended absolute quasi-judicial immunity to court reporters.

The Court in Forrester v. White, 484 U.S. 219 (1988), held that a functional approach should be utilized to determine whether absolute immunity applies. Utilizing this "functional approach," the courts below were required to preliminarily determine whether the function being performed by Shanna Ruggenberg was "judicial" in nature. Next, the courts below were required to balance the ability to hold the court reporter accountable against the ill effect that imposing civil liability would have on the court system and the ability of individual court reporters to exercise their required functions.

The District Court and the Ninth Circuit both agreed that the application of this "functional approach" to the facts in this case mandated application of absolute quasi-judicial immunity to Shanna Ruggenberg and Byers & Anderson, Inc. This analysis was legally correct and followed long-standing precedent within the Ninth Circuit. The respondents ask this Court to deny petitioner Antoine's petition for writ of certiorari.

#### IV. LEGAL ANALYSIS.

##### A. THE NINTH CIRCUIT FOLLOWED PRECEDENT IN APPLYING ABSOLUTE QUASI-JUDICIAL IMMUNITY TO COURT REPORTERS.

The Ninth Circuit followed established precedent when it applied absolute quasi-judicial immunity to Shanna Ruggenberg and Byers & Anderson, Inc. In Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969), the plaintiff filed

suit under 42 U.S.C. § 1983 against a court reporter, as well as the State of California and a court clerk, complaining that these defendants had refused to furnish him with a portion of the transcript from his criminal trial. The Ninth Circuit summarily concluded that the acts charged against the court reporter (and court clerk) "were acts performed in their capacity as quasi-judicial officers and they were clothed with judicial immunity . . . ." 409 F.2d at 826. The Ninth Circuit affirmed the District Court's dismissal of claims against the individual defendants.

In holding that absolute quasi-judicial immunity applied to the court reporter and court clerk, the Stewart court cited Peckham v. Scanlon, 241 F.2d 761 (7th Cir. 1957). Stewart v. Minnick, 409 F.2d at 826. Peckham, like Antoine, had been convicted of robbery



and sentenced to prison. He subsequently brought suit against the court reporter at his trial, alleging that the court reporter had "negligently refused to furnish plaintiff with a transcript of the trial proceedings, even though plaintiff offered to compensate her." 241 F.2d at 763. The Seventh Circuit Court of Appeals concluded that the court reporter was immune from Peckham's civil rights claim. 241 F.2d at 763.

Other decisions of the Ninth Circuit and other federal courts of appeals have held that court personnel who function as an integral part of the judicial process, such as court clerks and court reporters, are absolutely immune from civil liability. See Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989), cert. denied, 494 U.S. 1085 (1990) (absolute quasi-judicial immunity applied to court reporters);

Mullis v. United States Bankruptcy Court, District of Nevada, 828 F.2d 1385 (9th Cir. 1987) ("court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process"); Dieu v. Norton, 411 F.2d 761 (7th Cir. 1969) (court reporter and court clerk protected from 42 U.S.C. § 1983 claims under doctrine of judicial immunity); Sullivan v. Kelleher, 405 F.2d 486 (1st Cir. 1969) (court clerk immune from civil rights claim, irrespective of allegation he acted maliciously or corruptly). See also Thurston v. Robison, 603 F. Supp. 336 (D. Nev. 1985) (court reporters performing acts in their capacity as quasi-judicial officers are clothed with judicial immunity); Zimmerman v. Spears, 428 F. Supp. 759 (W.D. Tex. 1977) (court clerks

entitled to same immunity as judges when performing their official duties).

B. THE NINTH CIRCUIT'S APPLICATION OF ABSOLUTE QUASI-JUDICIAL IMMUNITY TO COURT REPORTERS IS NOT IN CONFLICT WITH RECENT SUPREME COURT DECISIONS.

1. The Ninth Circuit Decision Does Not Conflict With Westfall or Forrester.

The petitioner claims that the Ninth Circuit's application of absolute quasi-judicial immunity to the respondents conflicts with two 1988 decisions of this Court; Westfall v. Erwin, 484 U.S. 292 (1988), and Forrester v. White, 484 U.S. 219 (1988). This Court's decision in Westfall is inapplicable to the facts in this case, and the Ninth Circuit's ruling below is consistent with Forrester.

a. In Westfall, The Court Analyzed Executive, Not Judicial, Immunity.

The petitioner argues that Westfall v. Erwin, 484 U.S. 292 (1988), requires a court to determine that a defendant was performing a "discretionary function" before the defendant will be afforded immunity. Petition at 15-16. In making this argument, the petitioner confuses the doctrines of executive and judicial immunity. Application of the doctrine of executive immunity requires a threshold determination that the executive official was performing a discretionary function. Westfall v. Erwin, 484 U.S. at 299-300. Application of the doctrine of judicial immunity requires a threshold determination that the defendant in the judicial branch was performing a "judicial" act or function. Forrester v. White, 484 U.S. at 227.

In Westfall v. Erwin, supra, a civilian worker at an Army depot who was exposed to a toxic substance brought suit against federal employees in the executive branch, alleging that he had suffered injuries as a result of the federal employees' negligence in performing official acts within the scope of their employment. The Westfall Court did not purport to overrule pre-existing immunity law. The Westfall Court affirmed the Eleventh Circuit, which held that immunity does not apply to a member of the executive branch unless the federal official was performing a discretionary function and was within the scope of his or her employment. 484 U.S. at 299-300.

The Westfall Court's reiteration and clarification of executive branch immunity is inapplicable to this case. The Ninth Circuit appropriately requires

a federal official to show that he or she was performing a discretionary function before the court will afford immunity to a federal employee in the executive branch. See Saul v. Larsen, 847 F.2d 573 (9th Cir. 1988) (Social Security Administration employees are not protected by absolute immunity unless they were performing discretionary acts and their official function would suffer under the threat of prospective litigation). The Ninth Circuit follows Westfall when analyzing executive branch immunity. The immunity afforded the respondents in the courts below was quasi-judicial immunity, not executive branch immunity.

b. The Ninth Circuit's Decision Is Consistent With Forrester.

In Forrester v. White, 484 U.S. 219 (1988), this Court held that a state court judge was not protected by



absolute judicial immunity from damages under 28 U.S.C. § 1983 for his decision to demote and dismiss a court employee. The Forrester Court held that a "functional approach" should be used in determining whether judicial immunity applies to the facts in a particular case. The Court held that a court should analyze the function of the judicial officer, rather than merely rely upon the title of the officer, in determining whether absolute judicial immunity applies. This functional approach also requires a balancing of the risk of non-accountability against the effect that exposure to civil liability would likely have on the appropriate exercise of the judicial officer's function. Forrester v. White, 484 U.S. at 224.

Petitioner Antoine suggests that the Forrester decision is new law which

overrules long-standing Ninth Circuit precedent. The Forrester Court's refusal to extend judicial immunity to a judge's administrative acts was not novel. The Forrester Court cited its own 1880 decision in Ex Parte Virginia (100 U.S. 339) as authority for its holding. 448 U.S. at 228. The "functional approach" articulated in Forrester is a method of analysis acknowledged by the Supreme Court as "[r]unning through our cases, with fair consistency." 448 U.S. at 224. The process of evaluating a judicial officer's function, and the effect that exposure to civil liability would have on the performance of that function, was consistent with law predating Forrester, under which cases like Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969), and Peckham v. Scanlon, 241 F.2d 761 (7th Cir. 1957), were decided. No



appellate court has held that Forrester overruled precedent in jurisdictions which have extended absolute quasi-judicial immunity to court reporters. Forrester may clarify the requirements for the application of judicial immunity, but Forrester does not purport to reject or overrule pre-existing case law.

In Forrester, the Court asked whether the judge's function in firing a court employee was "judicial" or "administrative" in nature. The Forrester Court held that the judge was acting in his administrative capacity, rather than serving a judicial function, when he demoted and discharged the court employee. 484 U.S. at 229. The Forrester Court did not ask whether the judge's conduct was discretionary or ministerial. Clearly, the decision of whether to demote or fire an employee is

discretionary. The proper test for determining whether judicial immunity attaches is whether the function performed was "judicial" in nature.

The District Court and the Ninth Circuit below correctly found that a court reporter who is reporting and transcribing the record of a trial is performing a judicial function which is an integral part of the judicial process. Supervising the preparation of the record of a trial is the court's responsibility, even though this duty is generally delegated to the court reporter and court clerk. See Dellenbach v. Letsinger, 889 F.2d at 761.

Petitioner Antoine's allegations against the respondents pertain to the recording and transcription of his criminal trial in the United States District Court for the Western District of Washington at Tacoma. The recording

and transcription of a trial in federal court is clearly a judicial function under the "functional analysis" set forth in Forrester v. White, 484 U.S. 219.

2. Public Policy Favors The Application Of Absolute Quasi-Judicial Immunity To Court Reporters.

The Forrester Court explained that determining whether any given function is entitled to absolute judicial immunity requires a balancing of interests. Public policy favors the application of absolute immunity to court reporters to protect them from the threat of suit arising from the performance of their court-related duties. Like the court clerk, the court reporter is necessary to the efficient functioning of the judicial process. In essence, the reporter and clerk are an extension of

the judge. The integral relationship between the functions performed by court reporters and the judicial process has led to recognition that these individuals should be protected by absolute immunity when serving in their official capacity.

Necessarily, immunity may protect some individuals who act with improper motives. See, e.g., New Alaska Development Corp. v. Guetschow, 869 F.2d 1298, 1301-02 (9th Cir. 1989) (malice or corrupt motive in the performance of judicial tasks is insufficient to deprive a judge of absolute immunity). In balancing this risk against the benefit of affording court reporters immunity, the Courts below acknowledged that the judicial system has means to hold court reporters accountable and to provide some redress to litigants who

are harmed by a court reporter's failure to produce a transcript. The court may impose sanctions on court reporters (which happened in this case) or remove them from their positions. If a litigant is prejudiced by a court reporter's failure to produce a transcript, the litigant may ask an appellate court to vacate a judgment because of this prejudice (which also happened in this case).

The Ninth Circuit in Antoine v. Byers & Anderson, Inc., 950 F.2d 1471 (9th Cir. 1991), and the Seventh Circuit in Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989), cert. denied, 494 U.S. 1085 (1990), applied the public policy balancing test required by Forrester and concluded that court reporters should be afforded absolute quasi-judicial immunity when performing their official

functions. The Dellenbach court particularly stressed the danger that disappointed litigants, blocked by the doctrine of absolute judicial immunity from suing a judge directly, will vent their wrath on clerks, court reporters, and other judicial officers. 889 F.2d at 763.

In addition to the threat of vexatious litigation, the court system would be severely disrupted if court reporters were required to defend themselves in civil litigation whenever a trial transcript was not delivered within 30 days as prescribed by statute. In most cases, as was true in this case, the transcript is delayed due to the court reporter's backlog of ordered transcripts. This backlog is dependent upon the number of cases appealed in a particular court and the

adequacy or inadequacy of court reporter staffing. These factors are not within the court reporter's control, and discovery concerning these issues would be necessarily disruptive to the court and the judicial system. Public policy favors the application of absolute quasi-judicial immunity to court reporters.

V. CONCLUSION.

In affirming the District Court's dismissal of the respondents by summary judgment, the Ninth Circuit followed established precedent. Recent Supreme Court decisions did not overrule this long-standing precedent. The Ninth Circuit followed the functional approach set forth by this Court in Forrester v. White, supra. Petitioner Antoine's petition for writ of certiorari to the Ninth Circuit should be denied.

DATED this 23<sup>rd</sup> day of April, 1992.

Respectfully submitted,

MERRICK, HOFSTEDT & LINDSEY, P.S.

By Tyna Ek  
Tyna Ek  
Of Attorneys for Respondent  
Byers & Anderson, Inc.

710 Ninth Avenue  
Seattle, Washington 98104  
Telephone: (206) 682-0610

BETTS, PATTERSON & MINES

By William P. Fite  
William P. Fite  
Of Attorneys for Respondent  
Shanna Ruggenberg

1215 Fourth Avenue, #800  
Seattle, Washington 98161-1090  
Telephone: (206) 292-9988

(1559L3)



**APPENDIX A**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF	)	No. 86-3073
AMERICA,	)	
	)	
Plaintiff/	)	
Appellee,	)	
	)	
vs.	)	DC# CR-85-87-JET
	)	Western Washington
JEFFERY ANTOINE,	)	(Tacoma)
	)	
Defendant/	)	ORDER
Appellant.	)	
_____	)	

Before: SNEED, Circuit Judge

On April 28, 1988, this court ordered Court Reporter Shanna Ruggenberg to file, within 7 days, either the outstanding transcripts for this case or a motion for extension of time. Court Reporter Ruggenberg was also ordered to show cause why she should not be sanctioned for failure to comply with the transcript due date set earlier. To date, Court Reporter Ruggenberg has failed to comply with the order or communicate with this court.

Within 7 days of the date of this order, Ms. Ruggenberg shall either file the transcripts for March 3, 4, and 11, 1986, or shall turn over her notes for those days to her attorney, Randall M. Johnson, and notify this court that she has done so.

If Ms. Ruggenberg cannot locate her notes for those days, she shall submit an affidavit to that effect to this court within 7 days of entry of this order.

If Ms. Ruggenberg fails to comply with this order, sanctions may be imposed without further warning.

The clerk will serve a copy of this order on the court reporter monitor; the district court judge; Court Reporter Shanna Ruggenberg at 904 118th Avenue Court East, Puyallup, WA 98371; and Ms. Ruggenberg's attorney Randall M. Johnson, Esq. at 4041 Ruston Way, Tacoma, WA 98402.

APPENDIX B

NO. 86-3073  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	DC# CR 85-87-JET
	)	Western Washington
	)	(Tacoma)
Plaintiff-	)	
Appellee,	)	
	)	
vs.	)	
	)	
JEFFERY ANTOINE,	)	AFFIDAVIT OF
	)	SHANNA RUGGENBERG
Defendant-	)	
Appellant.	)	
	)	

STATE OF WASHINGTON )  
County of Pierce ) ss.

SHANNA RUGGENBERG, being first duly sworn on oath, deposes and says:

That I am unable to locate the notes and tapes for the remaining portion of the transcript of proceedings in this action. I have previously filed with the above court some of the transcripts, which were transcribed from notes and tapes that I did have for this action.

This transcription is approximately 58 pages.

151  
SHANNA RUGGENBERG

SUBSCRIBED AND SWORN to before me  
this 11th day of July, 1988.

151  
NOTARY PUBLIC in and for the  
State of Washington, residing  
at Tacoma.  
My commission expires: 3/9/92.

APPENDIX C

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JEFFREY ANTOINE,	)	No. 90-35293
	)	90-35362/63
Plaintiff/	)	
Appellant,	)	DC# CV-88-260-RJB
	)	
vs.	)	
	)	
BYERS & ANDERSON,	)	
INC., SHANNA	)	
RUGGENBERG,	)	
	)	
Defendants/	)	ORDER
Appellees.	)	
	)	

In response to appellee's motion to strike portions of appellant's brief and exhibits, the parties should be advised that the court will consider the record as it was before the court when it ruled on the motion for summary judgment (no more or no less).

FOR THE COURT,

CATHY A. CATTERSON  
CLERK OF COURT

151  
Gwendolyn Baptiste  
Deputy Clerk